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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE BRONX HOUSEHOLD OF FAITH,
JACK ROBERTS AND ROBERT HALL,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
COMMUNITY SCHOOL DISTRICT NO. 10 AND
CHARLES WILLIAMS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Board of Education of the City of New York by policy permits community groups to rent its school facilities for "civic, social and recreational purposes" and "religious discussion," but prohibits "religious services and instruction." A small house church in the Bronx requested to meet in a nearby middle school for its weekly Sunday morning worship services. School officials denied the request because the content of the meetings would include religious services and instruction.

1. Whether the Second Circuit below erred in holding -- in conflict with recent decisions by the First, Third, Fourth, Fifth and Eighth Circuits -- that public school facilities open to community groups for social, civic and recreational purposes, including religious discussion, are not a public forum but instead a limited forum, from which the government may exclude groups on the grounds that the expression they wish to engage in is a religious service or instruction?

2. Whether the Board of Education's prohibition on religious services and religious instruction in its forum violates the Free Speech Clause, the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause?

TABLE OF CONTENTS

OPINIONS BELOW 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS . 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 11

I. THE SECOND CIRCUIT'S DECISION THAT A FORUM OPENED TO THE PUBLIC FOR SOCIAL, CIVIC AND RECREATIONAL PURPOSES IS ONLY A LIMITED FORUM THAT MAY EXCLUDE RELIGIOUS WORSHIP AND INSTRUCTION CONFLICTS WITH THE RULINGS OF THIS COURT AND THOSE OF THE FIRST, THIRD, FOURTH, FIFTH AND EIGHTH CIRCUITS 12

A. OTHER CIRCUITS HAVE HELD UNCONSTITUTIONAL GOVERNMENT EXCLUSION OF RELIGIOUS WORSHIP OR INSTRUCTION FROM FORUMS OPENED BY POLICIES SIMILAR TO THIS ONE. 13

B. THIS COURT INDICATED IN *LAMB'S CHAPEL* THAT NEW YORK EDUCATION LAW §414 CREATED AN OPEN FORUM, BUT THE SECOND CIRCUIT REFUSED TO FOLLOW THIS COURT'S LEAD. 18

C. THE POLICY DOES NOT CREATE A LIMITED FORUM. 21

II THE SECOND CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES AND INSTRUCTION" AND "RELIGIOUS DISCUSSION" 22

III. THE POLICY VIOLATES THE CHURCH'S RIGHTS UNDER THE ESTABLISHMENT CLAUSE, THE FREE EXERCISE CLAUSE AND THE EQUAL PROTECTION CLAUSE 26

A. THE STATUTE AND THE POLICY VIOLATE THE ESTABLISHMENT CLAUSE. 26

B. THE STATUTE AND THE POLICY VIOLATE THE FREE EXERCISE CLAUSE 27

C. THE STATUTE AND THE POLICY VIOLATE THE EQUAL PROTECTION CLAUSE 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES:

Adderley v. Florida,
385 U.S. 39 (1966) 14

Board of Education v. Mergens,
496 U.S. 226 (1990) 9, 18, 20, 26, 27

Capitol Square Review Board v. Pinette,
132 L.Ed.2d 650 (1995) 24, 25

Chess v. Widmar,
635 F.2d 1310 (8th Cir. 1980) 14

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 27

Church on the Rock v. City of Albuquerque,
84 F.3d 1273 (10th Cir. 1996) 20

Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library,
883 F.2d 32 (5th Cir. 1989) 16

Cornelius v. NAACP Legal Defense and Education Fund, Inc.,
473 U.S. 788 (1985) 13

Country Hills Christian Church v. Unified Sch. Dist. No. 512,
560 F.Supp. 1207 (D.Kan. 1983) 17

Deeper Life Christian Fellowship v. Board of Education,
852 F.2d 676 (2d Cir. 1988) 8, 19

Employment Div., Dept. of Human Resources of Ore. v. Smith,
494 U.S. 872 (1990) 27

Fairfax Covenant Church v. Fairfax County School Bd.,
17 F.3d 703 (4th Cir. 1994) 16

Grace Bible Fellowship v. Maine School Admin. Dist. No. 5,
941 F.2d 45 (1st Cir. 1991) 15

Gregoire v. Centennial School District,
907 F.2d 1366 (3rd Cir. 1990) 15

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) ..... 3, *passim*

Lamb's Chapel v. Center Moriches Union Free School District,
959 F.2d 381 (2d Cir. 1992) 8, 20

Madison Joint Sch. Dist.v. Wis. Employment Relations Comm.,
429 U.S. 167 (1976) 14

Perry Education Association v. Perry Local Educators' Assoc.,
460 U.S. 37 (1983) 14, 21

Police Department v. Mosley,
408 U.S. 92 (1972) 10, 28

Rosenberger v. Rectors and Visitors of the Univ. of Virginia,
115 S.Ct. 2510 (1995) 9, 11, 20

Shumway v. Albany School District No. 1,
826 F.Supp. 1320 (D.Wyo. 1993) 17

Travis v. Owego-Apalachin School District,
92 F.2d 688 (2d Cir. 1991) 8, 19

Verbena United Methodist Church v. Chilton Cty. Bd. of Ed.,
765 F.Supp. 704 (M.D.Ala. 1991) 18

Wallace v. Jaffree,
472 U.S. 38 (1985) 26

Wallace v. Washoe County School District,
818 F.Supp. 1346 (D. Nev. 1991) 17

Widmar v. Vincent,
454 U.S. 263 (1985) ..... 9, *passim*

STATUTES:

28 U.S.C. §1254 2

42 U.S.C. §1983. 6

42 U.S.C. §2000bb *et seq*. 7

New York Education Law §414 ..... 2, *passim*

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THE BRONX HOUSEHOLD OF FAITH,
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THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT NO. 10 and CHARLES WILLIAMS,

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OPINIONS BELOW

The panel decision of the Second Circuit is reported at 127 F.3d 207 and appears in the Appendix at 1a. The opinion of the U.S. District Court for the Southern District of New York is unreported and appears in the Appendix at 32a. The Second Circuit's order of November 24, 1997 denying the petition for rehearing and suggestion for hearing en banc is unreported and

appears in the Appendix at 46a.

JURISDICTION

The Second Circuit denied the petition for rehearing and suggestion for rehearing en banc on November 24, 1997. App. 46a. The panel decision of the Second Circuit was issued on September 15, 1997. This Court has jurisdiction to review this decision under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendments I and XIV are found in the Appendix at 48a. New York Education Law §414 is found in the Appendix at 48a. The facilities use policy for the Board of Education for the City of New York is found in the Appendix at 52a.

STATEMENT OF THE CASE

The Bronx Household of Faith ("the Church"), an evangelical Christian church which meets in a house, sought to rent a local middle school for its Sunday morning worship services from Community School District No. 10 ("the School District"), a local school district under the jurisdiction of the Board of Education of the City of New York. The School District denied the Church's request based on its policy prohibiting its buildings from being used for "religious services or instruction." The School District has allowed the Church to rent the middle school twice before for nonreligious events. The Church challenges the constitutionality of the prohibition.

The School District's Facility Use Policy

A state statute and a school district policy based on the

statute govern use of the public schools facilities by community groups for expressive activities. New York Education Law §414 permits nonschool community groups to use public school buildings for "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," provided that "such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public."A state intermediate appellate court in New York ruled in 1978 that this New York state law prohibits meetings in schools for religious purposes. *Trietley v. Board of Ed. of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (App. Div. 1978). The Second Circuit and this Court have accepted *Trietley* as an authoritative interpretation of this state law. *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384, 386-87 (1993).

Public schools in New York City, including Community School District No. 10 in the Bronx, have opened their facilities to community groups according to a school district policy based on New York Education Law §414. Under its policy entitled, "Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities," the Board of Education of the City of New York permits community groups to meet in school facilities for the following purposes (App. 52a):

> "For the purpose of instruction in any branch of education, learning or the arts." (5.6.1);
>
> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." (5.6.2);
>
> "...for holding political meetings where representatives of different viewpoints may be heard."(5.6.3);

> "For civic forums and community centers in accordance with applicable law." (5.6.4);
>
> "For such other uses as may be authorized by law." (5.6.6).

Another part of the policy states that the School District permits meetings by tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, local chapters of tax-exempt organizations, youth groups, scouts, Little League, teen clubs, labor unions, professional societies and private social service agencies, such as the local "Y"s and settlement houses. Policy 7.1 and 7.2; App.53a -54a.

Community groups can schedule weekly meetings with the School District for up to an entire year in advance. Community groups can renew these agreements with the School District for weekly meetings each year.

The School District's policy in section 5.9 prohibits community groups from engaging in religious services and instruction, but permits them to hold religious discussions. The School District relied on this part of the policy to refuse to rent its middle school facility on the weekend to the Church (App. 53a):

> No outside organization or group may be allowed to conduct **religious services or religious instruction** on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible. (Emphasis added).

Groups That Have Met in District 10 Schools

Many different groups and individuals met at the School District's facilities during the 1994-95 school year for meetings, lectures, concerts and other expressive activities (App. 6a-7a):

ACAP, Inc.
Alliance for Education
Boy Scouts
Bronx School of Music
Bronx YMCA
Bronx Youth Service
Crotona Coalition
Edgemont Day Care
Girl Scouts
Grace Lutheran Church
Greek Orthodox Community of Riverdale
Kingsbridge Heights
Mosholu Community
Mount Hope Housing
Pius XII Beacon
RDK West Camps
Riverdale Community Center
South Fordham
West African Association

The parties stipulated that the School District has always refused to allow religious worship or religious instruction in its school buildings. There has been no prior religious use of the schools in the past in Community School District No. 10. App. 7a-8a.

Churches have met in School District buildings, but none have used them for the prohibited purposes of religious worship

or instruction. For example, the petitioner Church in this case has twice rented the school building at issue for nonreligious events (a banquet and a sports and games night). The respondent School District has never contended that the respondent Church is ineligible to meet for any other reason other than the religious nature of the Church's intended use.

The Church Requests to Meet in the School for Worship

The Bronx Household of Faith is an evangelical Christian church that was formed in 1971 and has been meeting in the Bronx since that date. App.2a-3a. Robert Hall and Jack Roberts are the co-pastors of the Church. *Id.*

Because the Church is outgrowing the house where it has been meeting, Pastor Hall sought permission to meet in the gymnasium-auditorium of a nearby middle school. App.7a. On September 8, 1994, Pastor Robert Hall submitted letters to a variety of school officials seeking permission to rent M.S. 206B, Anne Cross Mersereau Middle School, on Sunday mornings for the Church's weekly worship service. *Id.* As noted, the Church had met in that school before for two nonreligious events. The worship service would consist of the singing of Christian hymns and songs, prayer, fellowship with other Church members and Biblical preaching. *Id.*

District 10 official Frank Pagliuca declined to rent the facility, saying that a religious worship service was a prohibited use under the School District's Policy 5.9. *Id.* Pastor Hall asked the superintendent for permission to meet for worship services, and was denied because of the same policy provision banning religious worship and instruction. *Id.*

The Church and its pastors then filed this lawsuit in state court in the Bronx under 42 U.S.C. §1983 and the New York

Declaratory Judgment Act, claiming a violation of their federal constitutional rights under the First Amendment to freedom of speech, free exercise of religion, rights under the Establishment Clause, rights under the Equal Protection Clause of the Fourteenth Amendment and rights under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq*. App. 3a. The School District then invoked its right to remove the case to federal district court. *Id.* The District Court upheld the School District's policy and its denial of the Church's request to meet in the school for worship services. *Id.*

The District Court's Opinion

On December 5, 1996, the U.S. District Court for the Southern District of New York issued an opinion granting the School District's motion for summary judgment and denying the Church's motion for summary judgment. App. 32a - 45a. The opinion found that the School District's policy and N.Y. Education Code §414 were constitutional under the First Amendment, and that they created a limited public forum for "non-exclusive" groups. App. 41a-43a.

The District Court ruled that a church worship service could never qualify under the policy as a group meeting for "social, civic ... and other uses pertaining to the welfare of the community." The District Court reasoned that religious groups could never be community groups under the policy because they are so different from secular community groups:

> [h]istorically and constitutionally in this country, however, religion cannot be lumped together with other social, civic and community welfare activities. From our earliest Pilgrim forefathers, it has been the tradition in this country for government and religion to remain

> separate. Establishment Clause, U.S. Constitution. Therefore, the assumption that broadly stated purposes such as "civic" and "community" must also encompass "religious" is unfounded.

District Court opinion, App. 41a-42a, n. 1.

The District Court denied the other claims raised by the Church and upheld the School District's policy. The Church appealed to the Second Circuit.

The Second Circuit's Opinion

The Second Circuit affirmed the District Court on a 2-1 vote, upholding the exclusion of religious expression both in the School District's policy and in New York Education Law §414. App. 1a. The Second Circuit essentially restated its earlier opinion from *Lamb's Chapel v. Center Moriches Union Free School District,* 959 F.2d 381 (2d Cir. 1992), which this Court unanimously reversed in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

The Second Circuit reaffirmed a ruling it had made three times earlier that the forum created in New York public schools by New York Education Law §414 allowing meetings for social, civic and recreational purposes is a limited forum, not a public forum. *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 680 (2d Cir. 1988); *Travis v. Owego-Apalachin School District,* 92 F.2d 688, 692 (2d Cir. 1991) and *Lamb's Chapel,* 959 F.2d at 387.

The Second Circuit rejected the Church's suggestion that this Court strongly indicated in *Lamb's Chapel* that the Second Circuit erred when it ruled that N.Y. Education Law §414 does

not create a public forum but a limited forum. This Court had said, "[t]he argument [that N.Y. Education Law creates an open forum] has considerable force, for the District's property is heavily used by a wide variety of private organizations ...," *Lamb's Chapel*, 508 U.S. at 391. The Second Circuit, however, relied on past state court precedents antedating *Lamb's Chapel* finding that the state law created a limited forum.

Because the School District had created only a limited forum, the Second Circuit reasoned that any exclusions were to be judged by a reasonableness standard. The Second Circuit noted that this Court had faulted the Second Circuit in *Lamb's Chapel* for "utter[ing] not a word in support of the reasonableness standard," *Lamb's Chapel*, 508 U.S. at 393 n.6. The Second Circuit then tried to correct this deficiency by supplying a number of reasons why the exclusion of religious expression is reasonable. The Second Circuit speculated that state legislators and school officials desired to avoid identification of public schools with religious worship services. App.14a-15a. Also, the Second Circuit found it reasonable "to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City." App. 15a.

The Second Circuit rejected the application of *Widmar v. Vincent*, 454 U.S. 263 (1981), because *Widmar* involved a university campus, not a public school. The Second Circuit explained that an open forum at a university campus is more "open" than an open forum at a public school. App. 11a-12a. Also, the Second Circuit rejected application of *Board of Education v. Mergens*, 496 U.S. 226 (1990), because *Mergens* involved a federal equal access statute for students and not the Free Speech Clause. App. 13a. The Second Circuit said there was no viewpoint discrimination as in *Lamb's Chapel* and *Rosenberger v. Rectors and Visitors of the University of*

Virginia, 115 S.Ct. 2510 (1995) by pointing out that the policy here does not allow a secular parallel to religious worship services to meet in the public schools. App. 14a. However, the Second Circuit stated that the policy did conform to *Lamb's Chapel* by permitting groups to meet for "discussing religious material or material which contains a religious viewpoint or for distributing such material." App. 16a.

The Second Circuit also rejected the Church's claims under the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause. The court ruled the policy and N.Y. Education Law §414 do not violate the Establishment Clause because the exclusion of religious worship and instruction from this "limited forum" was reasonable. App. 17a-18a.

The prohibitions on religious worship and instruction in the School District's policy and N.Y. Education Law §414 do not violate the Free Exercise Clause, the Second Circuit ruled, because they "do not bar any particular religious practice. They do not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The members of the Church here are free to practice their religion, albeit in a location separate from M.S. 206B." App. 19a.

The Second Circuit also ruled that the policy and N.Y. Education Law §414 did not violate the Equal Protection Clause under such decisions as *Police Department v. Mosley*, 408 U.S. 92 (1972), because those decisions applied to traditional open forums, not the "limited forum" the Second Circuit found created in this case. App. 19a-20a.

Judge José A. Cabranes dissented in part from the majority's decision. He expressed some doubt about whether the Second Circuit had correctly upheld exclusion of religious expression

from public schools under N.Y. Education Law §414. However, Judge Cabranes stated that a panel of the Second Circuit could not overrule the decision of the other panels that had ruled that N.Y. Education Law §414 created a limited forum. App. 23a. Judge Cabranes pointed out that the earlier Second Circuit decisions finding that state law created only a "limited forum" were based on the pre-*Widmar* ruling by a New York intermediate appellate court, *Trietley v. Board of Education*, 409 N.Y.S.2d 912 (N.Y.App. Div. 1978). *Trietley* relied on a "now-outdated understanding of the Establishment Clause," Judge Cabranes wrote. App. 22a.

Judge Cabranes concluded that the School District engaged in unconstitutional viewpoint discrimination in violation of this Court's rulings in *Lamb's Chapel* and *Rosenberger*. He dissented from the panel's ruling upholding the policy's restriction on religious instruction from the forum. Judge Cabranes pointed out that the policy opened the schools "[f]or the purpose of instruction in any branch of education, learning or the arts" and concluded that to permit all instruction, but exclude religious instruction, is viewpoint discrimination. App. 24a-31a.

The Church filed a petition for rehearing and a suggestion for hearing en banc. The Second Circuit denied the petition and the suggestion on November 24, 1997. App. 46a-47a.

REASONS FOR GRANTING THE PETITION

This Court should grant review in this case and reverse the Second Circuit's aberrant interpretation of the First Amendment that allows New York state school districts to exclude religious services and instruction from facilities generally open to the public during nonschool hours. The Second Circuit makes an unconstitutional distinction between

religious worship and instruction, on the one hand, which a school district may ban from a public forum, and religious discussion, on the other hand, which it could not ban. This ruling collides with this Court's public forum cases such as *Widmar v. Vincent,* 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 392 (1993), and others. The exclusion of religious worship and instruction from the forum formed by the School District policy and New York Education Law §414 violates the Free Speech Clause, the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause.

I.

THE SECOND CIRCUIT'S DECISION THAT A FORUM OPENED TO THE PUBLIC FOR SOCIAL, CIVIC AND RECREATIONAL PURPOSES IS ONLY A LIMITED FORUM THAT MAY EXCLUDE RELIGIOUS WORSHIP AND INSTRUCTION CONFLICTS WITH THE RULINGS OF THIS COURT AND THOSE OF THE FIRST, THIRD, FOURTH, FIFTH AND EIGHTH CIRCUITS

The Second Circuit held that a public school district may deny equal access to after-school use of its facilities for religious worship or instruction solely because of the religious content of the planned use. The Second Circuit also ruled that a forum opened for "civic, cultural and recreational activities" is not an open forum, but a limited forum. This ruling conflicts with at least five other federal appeals court decisions. Those circuit decisions addressed whether government officials could exclude religious expression from forums opened for expression very similar to the speech this policy permits in this case. Three of these circuit decisions involved public schools. This Court should grant review and reverse the Second

Circuit's conflicting ruling.

A. Other Circuits Have Held Unconstitutional Government Exclusion of Religious Worship or Instruction From Forums Opened by Policies Similar to This One.

The Board of Education of the City of New York, by policy and practice, allows nonschool groups to meet for "social, civic and recreational" purposes, and "for such other uses as may be authorized by law." Policy 5.6.2 and 5.6.6; App. 52a. The School District permits meetings by tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, local chapters of tax-exempt organizations, youth groups, scouts, Little League, teen clubs, labor unions, professional societies and private social service agencies, such as the local "Y"s and settlement houses. Policy 7.1 and 7.2; App. 53a-54a.

This Court and at least five other circuits have found that similar policies created public forums, and that therefore the Constitution required the government to justify exclusions of religious expression from these forums with a compelling state interest. However, with completely circular logic, the Second Circuit ruled that this forum is only a limited public forum, because it excludes religious services and instruction. The Second Circuit then reasoned that the exclusion of religious services and instruction is to be judged only by the reasonableness standard.[1] (The reasonableness standard is used

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[1] This Court uses a forum analysis in deciding claims of access to public property for expressive activities. *See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 797 (1985) ("we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or non-public"). There are "three types of fora: the traditional public forum,

for a nonpublic forum, not a limited forum, which shows further confusion on the Second Circuit's part).

This case is very similar to *Widmar v. Vincent,* 454 U.S. 263 (1981) and *Widmar* should control the result here. This Court ruled in *Widmar* that the University of Missouri-Kansas City had created a public forum for students by policy, and that it violated the Free Speech Clause to prohibit a student worship service from meeting on campus. The policy at issue in *Widmar* permitted meetings for "political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980), which is similar to the policy creating the forum in this case. This Court and the Eighth Circuit ruled the University of Missouri had created a public forum with an unconstitutional content-based exclusion of religious worship.

In addition to the Eighth Circuit's decision in *Chess v. Widmar,* the Second Circuit's decision conflicts with the decisions of four other circuits on whether such access policies

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the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property traditionally open to assembly and debate, such as public streets and parks. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] ... for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups. *Widmar v. Vincent*, 454 U.S. 263 (1981) and school board meetings opened for citizen input, *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966). The Second Circuit's concept of a "limited forum" improperly confuses a designated public forum with a nonpublic forum.

create open forums and whether the religious exclusions are constitutional. In each of these cases, the federal circuit courts ruled that the government must permit religious worship or instruction in school facilities (and a public library) because the government had opened the facilities for community use. In contrast, the New York City school board policy upheld by the Second Circuit would have barred access for each of the religious uses that the other circuits ruled the Constitution requires.

The First Circuit ruled in *Grace Bible Fellowship v. Maine School Administrative District No. 5,* 941 F.2d 45 (1st Cir. 1991), that a Maine school district had created a public forum when it opened its buildings for meetings by youth groups, community, civic and service organizations, government agencies, educational programs, and cultural events.[2] A school district in Maine rejected a local church's request to rent the high school for an evangelistic outreach that would have included a free Christmas meal and preaching on the true meaning of Christmas because of the event's religious preaching and prayer. The First Circuit ruled that the school district violated the church's First Amendment rights with its policy prohibiting community groups from leasing school facilities "for the direct advancement of religion," calling the school district's actions "censorship," 941 F.2d at 48, and an "elementary violation" of the First Amendment. *Id.* This evangelistic Christmas dinner probably would have been denied access to New York City school facilities under the Second Circuit's opinion.

The Third Circuit ruled in *Gregoire v. Centennial School*

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[2] The text of the Maine school district's policy does not appear in the First Circuit's opinion, but it was in the record before that Court and is taken from the Brief of Appellees, pps 9-10.

District, 907 F.2d 1366 (3rd Cir. 1990), that a suburban Philadelphia school district had created a public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions. 907 F.2d at 1372-73, 1378-79. The Third Circuit ruled that the school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by Andre Kole, an evangelist who performs an illusionist show as a vehicle to preach a Christian gospel message to the audience. The Third Circuit declared unconstitutional a policy which prohibited community groups from using school facilities "for religious services, instruction and/or religious activities." This evangelistic illusionist event probably would not have been permitted to meet in New York City school facilities under the Second Circuit's ruling.

The Fourth Circuit ruled in *Fairfax Covenant Church v. Fairfax County School Bd.*, 17 F.3d 703 (4th Cir. 1994), that a school district had created a public forum by its policy permitting meetings by cultural, civic and educational groups, as well as political organizations. The Fourth Circuit declared unconstitutional the school district's policy that required churches to pay more than nonreligious groups to rent school buildings. The worship services granted equal access by the Fourth Circuit's opinion probably would have been prohibited from New York City schools under the Second Circuit's opinion.

The Fifth Circuit ruled in *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989), that a public library had established a public forum with its policy permitting meetings of a "civic, cultural or educational character." 883 F.2d at 33-34. The library's policy also expressly excluded religious

expression. The Fifth Circuit found the religious exclusion violated the First Amendment when it excluded a woman's prayer group from meeting in the library's auditorium for a group prayer meeting. 883 F.2d at 34. Under the Second Circuit's opinion, this women's prayer meeting would have probably been barred from meeting in New York City schools.

Additionally, five district courts in Nevada, Kansas, New York, Wyoming and Alabama have ruled that school districts violated the First Amendment by excluding religious worship services from public schools generally open for expressive activities by community groups. All five district courts permitted worship services or religious instruction that probably would have been barred from meeting in New York City school facilities under the Second Circuit's ruling:

-- *Wallace v. Washoe County School District,* 818 F.Supp. 1346 (D. Nev. 1991) (school district may not prohibit a church from meeting in a school for Sunday morning worship services because school is generally open for use by community groups).

-- *Country Hills Christian Church v. Unified School District No. 512,* 560 F.Supp. 1207 (D.Kan. 1983) (school district may not deny church access to the school's public forum so a church can hold worship services).

-- *Randall v. Pegan,* 765 F.Supp. 793 (W.D.N.Y. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

-- *Shumway v. Albany School District No. 1,* 826 F.Supp. 1320 (D.Wyo. 1993) (school district must open its public forum to a private baccalaureate service for the graduating seniors).

-- *Verbena United Methodist Church v. Chilton County Board of Education*, 765 F.Supp. 704 (M.D.Ala. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

Five federal circuit courts and five district courts ordered school districts and a public library to permit religious worship and instruction in forums created by policies very similar to the one in this case. Yet the Second Circuit upheld the ban on religious services and instruction. The Second Circuit's decision conflicts with this Court's decisions permitting religious worship and instruction in public forums in such cases as *Widmar v. Vincent*, 454 U.S. 263 (1981), *Board of Education v. Mergens*, 496 U.S. 226 (1990) *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993) and *Fowler v. Rhode Island*, 345 U.S. 67 (1953). This Court should grant review in this case to resolve the conflict between the Second Circuit's decision and the cases described above, and to confirm that religious services and instruction cannot be excluded from a public forum generally open to the public for expressive activity.

B. This Court Indicated in *Lamb's Chapel* That New York Education Law §414 Created An Open Forum, But the Second Circuit Refused to Follow this Court's Lead.

This Court strongly indicated in *Lamb's Chapel* that the Second Circuit has erred with its repeated rulings that N.Y. Education Law §414 (and a school district policy based on the law) creates only a limited forum and not a public forum.

> The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for such a wide

> variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora such as parks and sidewalks. Hence, its view was that subject-matter or speaker exclusions on District property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end (citations omitted). Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. **The argument has considerable force,** for the District's property is heavily used by a wide variety of private organizations .... We need not rule on this issue ....

Lamb's Chapel, 508 U.S. at 392 (emphasis added).

This Court resolved *Lamb's Chapel* on the basis of the viewpoint discrimination in the case. This case presents the clear-cut content discrimination issue that this Court said "has considerable force" in *Lamb's Chapel*, but was left unanswered. The Second Circuit refused to agree that this Court dropped an "anvil-like hint" (App. 9a and 23a) in *Lamb's Chapel* that the Second Circuit had erred. Therefore, the Second Circuit refused to reverse its repeated earlier rulings that N.Y. Education Law §414 creates only a limited forum, not a public forum. This is at least the fourth case in which the Second Circuit has insisted that the state statute creates only a limited forum, contrary to this Court's precedents. *See Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 680 (2d Cir. 1988); *Travis v. Owego-Apalachin School District*, 92 F.2d 688, 692 (2d Cir. 1991) and *Lamb's Chapel*, 959 F.2d at 387 (2d Cir. 1992).

This is not a situation in which the Second Circuit has made one aberrational decision that its judges will correct in some future case. The Second Circuit has now refused four times to apply this Court's decisions in *Widmar, Mergens* and *Lamb's Chapel*. That court has repeatedly rejected this Court's equal access precedents, and has openly refused to "take the hint" this Court gave in *Lamb's Chapel* that New York law does indeed create an open forum with a content-based exclusion of religious speech.

This Court should grant review of this case and speak directly to the issue it addressed only parenthetically in *Lamb's Chapel* -- whether N.Y. Education Law §414 creates a public forum which requires the School District to justify its content-based exclusions of religious expression with a compelling state interest.[3]

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[3] The Church also raises a viewpoint discrimination claim. The Second Circuit is in conflict with the Tenth Circuit's decision in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. denied.*, 117 S. Ct. 360 (1996). However, the case would be best resolved on the basis of content discrimination as this Court did in *Widmar*. Although this Court could resolve this case on the grounds of viewpoint discrimination, Judge Cabranes' dissenting opinion illustrates the problem with addressing this case solely as one of viewpoint discrimination. Judge Cabranes pointed out correctly that the policy permits "instruction" in the forum, but disallows religious instruction, which is viewpoint discrimination under *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995). However, Judge Cabranes agreed with the majority that the School District could ban religious worship from the forum. This means that under Judge Cabranes' reasoning, the church members could meet in the school to hear the sermon preached (because it is "instruction" permitted under the policy), but could not sing hymns or pray (because they are prohibited religious worship). This Court should resolve this case as it did in *Widmar* by ruling that the School Board has created a public forum with an unconstitutional content-based exclusion of religious worship and instruction.

C. The Policy Does Not Create a Limited Forum.

This Court should grant review to correct the Second Circuit's distorted concept of a "limited forum." The Second Circuit's position is that if there is any exclusion at all, the forum is limited, and the exclusions are judged by a reasonableness standard. App. 8a-9a. This circular reasoning guts this Court's forum doctrine. Under the Second Circuit's standard, this Court erred by ruling in favor of the student religious group in *Widmar* because the University really had a "limited forum" -- everyone can meet on campus for any purpose except religious worship.

N.Y. Education Law §414 does not create a limited forum, as the Second Circuit has ruled in this case and earlier held in three other cases. The forum is not limited to a specific subject matter or limited to a certain group of people, as a limited forum requires. *See Perry*, 460 U.S. at 45 n.7. The Church is eligible to meet in the forum under the policy and has done so twice for nonreligious meetings. Practically, there is no limit to the speech that can be expressed in the forum --except that it cannot be a religious service or religious instruction.

This Court should take this case to declare that in order to create a genuine "limited forum," the government must limit the forum to a clear category of people (e.g., students or employees), or a clear category of subject matter (*e.g.*, the agenda before a town council meeting, or a government theater dedicated to Shakespearean-era plays). A policy that says, "everyone and every group may meet for expressive activities, but not religious worship and instruction" does not create a limited forum under the First Amendment, but an unconstitutional content-based exclusion of protected speech from an open forum, as this Court found in *Widmar*.

II.

THE SECOND CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES AND INSTRUCTION" AND "RELIGIOUS DISCUSSION"

The Second Circuit decision clearly conflicts with this Court's decision in *Widmar* by distinguishing between religious speech and religious worship. The Second Circuit essentially ruled that religious worship is less protected under the First Amendment than religious speech and other expression. The Second Circuit's decision distinguishes religious worship and instruction, on the one hand, which it said could be banned from the forum; and religious discussion, on the other hand, which it stated *Lamb's Chapel* requires it to permit. App. 16a. This distinction is flatly inconsistent with this Court's decision in *Widmar*. Although the policy bans "religious services or instruction," it permits nonschool groups to rent buildings "for the purpose of discussing religious material or material which contains a religious viewpoint ..." Policy 5.9, App. 53a. This Court addressed that specific question in *Widmar* and ruled that religious worship and religious speech are both equally protected by the First Amendment. The Second Circuit ignored *Widmar* and analyzed the case at bar as if this Court intended *Lamb's Chapel* to somehow overrule or eclipse *Widmar*.

This Court never intended any such thing and has repeatedly rejected the argument that the Constitution requires government to permit religious speech but allows it to prohibit religious worship in a public forum. In *Widmar*, this Court stated:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in **religious**

> **worship** and **discussion**. These are forms of speech and association protected by the First Amendment.

Widmar, 454 U.S. at 269 (emphasis added).

In *Widmar*, This Court devoted an extensive footnote explaining that religious worship and religious speech are both equally protected equally under the Free Speech Clause, giving three reasons. *See Widmar*, 454 U.S. at 269, n. 6.

The first reason this Court gave rejecting the distinction was that there is no intelligible way to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing, hymns, reading scripture, and teaching biblical principles," *post* at 283, cease to be "singing, teaching and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected "worship."

Widmar, 454 U.S. at 269, n. 6.

The second reason why this Court in *Widmar* refused to make a constitutional distinguish between "protected" religious speech and "unprotected" religious worship is that the government and courts would have to delve deeply into a religious group's affairs in violation of the Establishment Clause in order to make the distinction:

> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer (citations omitted). Merely to draw

> the distinction would require the university -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases (citations omitted).

Widmar, 454 U.S. at 269, n. 6.

The third reason this Court gave in *Widmar* was that there is no good reason to protect "religious speech" only and not protect "religious worship" under the Constitution.

> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. *See, post* at 284-285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, *see Heffron, supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

Widmar, 454 U.S. at 269, n. 6.

This Court repeated this principle in its majority opinion of *Capitol Square Review Bd. v. Pinette*, 132 L.Ed.2d 650 (1995):

> Indeed, in Anglo-American history, at least, government suppression of speech has so

> commonly been directed *precisely* at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, **or even acts of worship**, *Widmar,* supra at 269, n. 6.

Pinette, 132 L.Ed.2d at 660. (emphasis added).

By the wording of its policy, the School District apparently thinks this Court ruled in *Lamb's Chapel* that the Constitution protects religious speech more than it does religious worship. The Second Circuit affirmed that misunderstanding in its decision. But *Lamb's Chapel* in no way overruled *Widmar*. The decisions complement each other and are not in conflict. Although this Court resolved *Lamb's Chapel* on the basis of viewpoint discrimination, this Court did not intend for *Lamb's Chapel* to nullify its earlier ruling in *Widmar* that the Free Speech Clause equally protects religious worship and religious speech. The Second Circuit needlessly pits *Lamb's Chapel* against *Widmar,* and creates confusion in this area of First Amendment jurisprudence.

This Court should grant review and reject the School District's distinctions between religious worship and instruction (which it bans from the forum) and religious discussion, (which it permits in misguided deference to this Court's decision in *Lamb's Chapel*). This Court refuted that confusing distinction in *Widmar* and needs to do so again.

Additionally, this Court should grant review and rule that under the First Amendment, the government cannot and should not determine what is permitted "religious discussion," and what is prohibited religious worship or instruction.

III.

THE POLICY VIOLATES THE CHURCH'S RIGHTS UNDER THE ESTABLISHMENT CLAUSE, THE FREE EXERCISE CLAUSE AND THE EQUAL PROTECTION CLAUSE

The Second Circuit rejected the Church's arguments that N.Y. Education Law §414 and School District's policy violate the Establishment Clause, the Free Exercise of Religion Clause and the Equal Protection Clause. The basic violation is similar under all three constitutional provisions -- the state statute and the policy single out religious services and instruction for disparate and hostile treatment. The Second Circuit saw no merit it any of the claims. App. 17a-20a. This Court should grant review to reverse the Second Circuit's calloused application of those constitutional provisions in this case.

A. The Statute and the Policy Violate the Establishment Clause.

The School District's policy violates the Establishment Clause by singling out religious services and instruction for treatment worse than other expression by community groups. The Establishment Clause requires government neutrality toward religion. "[T]he government must pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Government can violate the Establishment Clause's neutrality principle by treating religion worse than other groups, as well as by favoring religion. The School District violates that neutrality principle in this case. As this Court stated in *Mergens*, 496 U.S. 226 (1990):

> if a State refused to let religious groups use facilities open to others, then it would

> facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Mergens, 496 U.S. at 248. The Second Circuit rejected this argument by stating that this principle only applied to a public forum, and not to a limited forum. App. 18a. There is no precedent for such a remarkable application of Establishment Clause jurisprudence, and this Court should reject it.

B. The Statute and the Policy Violate the Free Exercise Clause.

N.Y. Education Law §414 and the School District's policy blatantly violate the Free Exercise Clause because they single out religious expression and treat it worse than other speech topics. Under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court stated that government actions violate the Free Exercise Clause if they "impose special disabilities on the basis of religious views or religious status." 494 U.S. at 877. This Court repeated that point In *Church of the Lukumi Babalu Aye v. City of*, 508 U.S. 520 (1993):

> There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, **for the minimum requirement of neutrality is that a law not discriminate on its face**. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

The Second Circuit ruled that there was no violation of the Free Exercise Clause because the policy excludes the worship and instruction of all religions. App. 19a. Such an extreme interpretation means government may openly discriminate against religious practices, as long as it excludes all of them. This Court has never interpreted the Free Exercise Clause to allow "equal opportunity" discrimination against all religious expression, and in fact has ruled just the opposite. This Court should grant review and reverse the Second Circuit's decision because it fails to grant any protection to the free exercise of religion that is so blatantly infringed upon in this case.

C. The Statute and the Policy Violate the Equal Protection Clause.

The Second Circuit erred in denying the Church's claim under the Equal Protection Clause. In *Police Department v. Mosley*, 408 U.S. 92 (1972), this Court ruled that content-based restrictions of free speech violate the Equal Protection Clause. The unconstitutional ordinances in *Mosley* "describe[d] permissible picketing in terms of its subject matter," 408 U.S. at 95. *Mosley* dealt with a content-based ban on speech, as in this case. Nonetheless, the Second Circuit rejected the Church's equal protection claim. This Court should grant review and reverse the Second Circuit's conclusion that no equal protection violation exists in this case.

CONCLUSION

For the reasons expressed above, petitioners respectfully ask this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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